What Torres v. Madrid *Reveals about Fact Bias in Civil Rights Cases*

By Amanda Peters•

What is it that I do when I decide a case? To what sources of information do I appeal for guidance? In what proportions do I permit them to contribute to the result? In what proportions ought they to contribute?

- Benjamin Cardozo[1]

I. Introduction

Civil rights cases are among the most common cases filed in federal court today.[2] Approximately 60,000 of these lawsuits are filed every year.[3] They rarely reach trial, however. The overwhelming number of cases are either dismissed or disposed of

• Godwin Lewis PC Research Professor & Professor of Law, South Texas College of Law Houston. I would like to thank my colleagues, my employer, and my family for their continuous support. Special thanks to my colleague Rocky Rhodes, and attorneys Eric Dixon, Roger Topham, and Don Tittle, all of whom read earlier drafts of this article.

[1] BENJAMIN CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 10-11 (1921).

[2] *E.g.*, *The Judicial Business of the United States Courts of the Seventh Circuit*, 11, Table 7 (2020) (civil rights cases were second to prisoner petitions), https://www.ca7.uscourts.gov/annual-report/2020_CA7_report.pdf; *Judicial Workload Statistics*, Fifth Circuit Court of Appeals, 2, Table 2 (2021) (civil rights cases account for the highest number of civil lawsuits filed since 2016), https://www.ca5.uscourts.gov/docs/default-source/default-document-library/clerk's-annual-report-july-2020-to-june-2021.pdf?sfvrsn=e4c9c82d_2.

[3] ERWIN CHEMERINSKY, PRESUMED GUILTY, 133 (2021).

through summary judgments filed by defendants.[4] Federal judges not only disfavor civil rights cases[5] but sometimes harbor biases towards civil rights plaintiffs.[6]

In a § 1983 civil rights lawsuit, plaintiff-citizens sue defendant-governments or government agents. Police officers are common defendants. Many of the officer-defendants in these lawsuits are repeat offenders.[7] The fact that law enforcement agencies nationwide have no system to report or track officer disciplinary records gives the worst violators the opportunity to offend again.[8] Within the past decade, police departments have spent $3.2 billion settling excessive force and other rights violations filed against police officers.[9] Half of that amount was spent on claims involving officers with multiple unrelated civil rights complaints against them.[10] The plaintiffs who received settlements are the fortunate ones; most never receive compensation of any kind.

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[4] *E.g.*, Elizabeth M. Schneider, *The Changing Shape of Federal Civil Pretrial Practice: The Disparate Impact on Civil Rights and Employment Discrimination Cases*, 158 U. PA. L. REV. 517, 532, 549 (2010) (70% of motions for summary judgment are granted, which is the second highest number of any federal civil cases); Patricia W. Hatamyar, *The Tao of Pleading: Do Twombly and Iqbal Matter Empirically?*, 59 AM. U. L. REV. 553, 613-15 (2010) (85% of pro se civil rights claims are dismissed).

[5] Richard L. Marcus, *The Revival of Fact Pleading Under the Federal Rules of Civil Procedure*, 86 COLUM. L. REV. 433, 471 (1986); Howard M. Wasserman, *Iqbal, Procedural Mismatches, and Civil Rights Litigation*, 14 LEWIS & CLARK L. REV. 157, 175 (2010).

[6] *E.g.*, Schneider, *supra* note 4, at 532, 549 (civil rights cases are 39.6% more likely to get dismissed under heighted pleading standards than other cases and 70% of motions for summary judgment are granted in those cases, which is the second highest number of any federal civil cases); Howard M. Wasserman, *Mixed Signals on Summary Judgment*, 2014 MICH. ST. L. REV. 1331, 1332 (2014) ("lower courts too readily grant summary judgment, particularly in favor of defendants and against plaintiffs, and more particularly in civil-rights cases").

[7] Keith Alexander *et al.*, *The Hidden Billion-Dollar Cost of Repeated Police Misconduct*, WASH. POST (March 9, 2022), https://www.washingtonpost.com/investigations/interactive/2022/police-misconduct-repeated-settlements/?itid=hp-top-table-main

[8] CHEMERINSKY, *supra* note 3, at 302.

[9] *Id.*

[10] *Id.*

One million civilian-police encounters result in use of force each year.[11] The number of police shootings keep rising.[12] In 2020 and 2021, the annual number of people killed by police exceeded 1,000 for the first time.[13] The data from non-fatal police shootings is harder to find. A handful of states retain this information: California, Colorado, and Texas.[14] In those states, forty-five percent of people shot by police are not fatally wounded.[15] As police departments have become more militarized, officers have escalated, rather than deescalated, the dangerousness of police-civilian encounters.[16]

In *Torres v. Madrid*, a case decided by the United States Supreme Court in 2021,[17] the officer defendants quickly, violently, and unnecessarily escalated their encounter with Roxanne Torres, the plaintiff, when they shot her twice in the back.[18] They had no objective reason to believe she was engaged in criminal activity; yet, they fired 15 shots into the side and back of her car as she drove away from them.[19] She sued, claiming the

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[11] *Id.* at 18.

[12] *Fatal Force Database*, WASH. POST, (updated daily), https://www.washingtonpost.com/graphics/investigations/police-shootings-database/

[13] *Id.*

[14] Justin Nix & John A. Shjarback, *Factors Associated with Police Shooting Mortality: A Focus on Race and a Plea for More Comprehensive Data* (Nov. 2021), https://journals.plos.org/plosone/article?id=10.1371/journal.pone.0259024

[15] *Id.*

[16] *E.g.*, CHEMERINSKY, *supra* note 3, at 7 (stating that a Los Angeles police chief took "a very hard-line, aggressive, paramilitary approach to policing" at a time when Black men accounted for 75 percent of the chokehold deaths, but only accounted for 9 percent of the population); Cara McClellan, *Dismantling the Trap: Untangling the Chain of Events in Excessive Force Claims*, 8 COLUM. J. RACE & L. 1, 30 (2017) (arguing that officers should not be permitted to use force if they created the need for it through overly aggressive tactics); Latasha M. James, *Excessive Force: A Feasible Proximate Cause Approach*, 54 U. RICH. L. REV. 605, 619-32 (2020) (courts should examine whether the officer's conduct before the seizure was the cause of the victim's injuries); Michael T. Wester, *Drawing A Line Between Rambo & Barney Fife: Overhauling the Department of Defense's Excess Property Program in Order to Halt the Overmilitarization of America's Police Forces*, 2016 U. ILL. L. REV. 729, 730, 749-52 (2016) (noting the questionable need of militarized weapons for police departments, along with the increase in civil rights violations); .

[17] Torres v. Madrid, 141 S. Ct. 989 (2021).

[18] *Id.* at 994.

[19] While the Supreme Court stated officers fired 13 bullets into her car, the record states one officer shot eight bullets into her car whereas another shot seven, for a total of fifteen. *Id.*; Appellant's Appendix at *115, *213, Torres v. Madrid, 769 Fed. App'x 654 (10th Cir. 2019) (No. 18-2134); Joint Appendix at *104,

officers violated her constitutional right against unreasonable seizure by using excessive force against her.[20] The district court granted the officers' motion for summary judgment and the Tenth Circuit affirmed its decision.[21] Both courts determined Torres was never seized because she successfully eluded capture for nearly a day, so the officers did not violate her Fourth Amendment rights.[22] The Supreme Court disagreed.[23]

Chief Justice John Roberts wrote the majority opinion and Justice Neil Gorsuch authored the dissent.[24] Roberts and Gorsuch vehemently disagreed.[25] Gorsuch's dissent echoed the scorched earth tone of the most heated Scalia dissent.[26] The majority ruled Torres was seized when she was shot by officers, whereas the dissent believed the fact she eluded police for hours after the shooting proved she was not seized and thus should be barred from suit.[27]

What is remarkable about the case is not the outcome, or even the vitriol flowing from Gorsuch's pen, but the fact statements. Gorsuch lauded the police officers and despised Torres,[28] so much so that many of the details he included in his fact statement

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Torres v. Madrid, 141 S. Ct. 989 (2021) (No. 19-292), 2020 WL 583655. The Supreme Court mistakenly believed that because crime scene detectives found thirteen casings, only thirteen bullets had been fired. Appellant's Appendix at *221. The deposition testimony contradicts this.

[20] Civil Complaint for Violation of Civil Rights, Torres v. Madrid, 2016 WL 11658100 (D. N.M. Oct. 21, 2016) (No. 1:16-cv-01163-LF-KK).

[21] Torres v. Madrid, 2018 WL 4148405, at *4 (D. N.M. Aug. 30, 2018); Torres v. Madrid, 769 F. App'x 654, 657-58 (10th Cir. 2019).

[22] Torres, 2018 WL 4148405, at *4; Torres, 769 F. App'x at 657-58.

[23] Torres, 141 S. Ct. at 1003.

[24] *Id*. at 994, 1003.

[25] *Id*. at 999, 1003.

[26] David H. Gans, *"We Do Not Want to Be Hunted": The Right to Be Secure and Our Constitutional Story of Race and Policing*, 11 COLUM. J. RACE & L. 239, 341 n. 305 (2021); Texas District & County Attorneys Association, Case Summaries (March 26, 2021), https://www.tdcaa.com/case-summaries/march-26-2021/ ("If dueling Supreme Court opinions are like boxing matches, then this is Rocky. Primary cases are the jabs, cutting commentary the knock-down blows. At the end, both fighters are beaten bloody, and the Chief Justice wins the split decision. Justice Gorsuch has assumed Justice Scalia's mantle as the Court's 'King of Sting' in dissent.").

[27] Torres, 141 S. Ct. at 999, 1003.

[28] *Id*. at 1003.

were not supported by the record; some things he said were untrue. The Tenth Circuit's fact statement was also biased against Torres.[29] Both of the fact statements modeled the defendants' fact statements in their motions and filings in court, along with their mischaracterizations from depositions and the appellate record.

One would expect the police officers' attorneys to strongly deny the facts in the plaintiff's complaint. One would also expect appellate judges to follow the standard of review, which requires them to view the facts in the light most favorable to Torres.[30] Unfortunately, what constitutes "light most favorable" to the nonmovant in a civil rights case varies considerably among federal judges. Judges who favor law enforcement officers frequently view the plaintiff's facts in a light least favorable, disregarding their legal obligation.

Fact bias is common in § 1983 cases. Conservative judges generally favor police officers, whereas liberal judges generally favor civil rights plaintiffs.[31] Conservative judges are also prone to heighten pleading standards to rid civil rights cases from their dockets.[32] Many civil rights cases are won or lost on what lens the federal judge uses to view the facts and pleadings. Too many are lost at the earliest stages of pre-trial litigation.[33]

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[29] Torres, 769 F. App'x at 655-56.

[30] Tolan v. Cotton, 572 U.S. 650, 655–656 (2014) (per curiam).

[31] *E.g.*, Lee Epstein, *Some Thoughts on the Study of Judicial Behavior*, 57 WM. & MARY L. REV. 2017, 2043 (2016); C.K. Rowland & Bridget Jeffery Todd, *Where You Stand Depends on Who Sits: Platform Promises and Judicial Gatekeeping in the Federal District Courts*, 53 J. POL. 175, 180-82 (1991); CHEMERINSKY, *supra* note 3, at 218-10 (for decades, there has been at least five conservative Supreme Court Justices who have favored police in criminal cases and in civil rights cases).

[32] Wasserman, *supra* note 6, at 1332.

[33] Theodore Eisenberg & Kevin M. Clermont, *Plaintiphobia in the Supreme Court*, 100 CORNELL L. REV. 193, 197 (2014).

There is no question that bias against civil rights cases has played a role in poor *outcomes*. But what if the bias arises before the outcome is even contemplated? What happens when implicit bias, personal experiences, politics, and other factors influence judges to view the facts in an improper way from the outset?

This Article examines the bias that begins with the judge's view of the facts in civil rights cases, using *Torres v. Madrid*, as well as other Supreme Court cases, as examples. Section two of this Article examines the difficulties plaintiffs have in pleading civil rights cases and how those pleading hurdles create factual hurdles. Section three explores some of the reasons for judicial bias in civil rights cases. Section four carefully explores the underlying facts of *Torres*. Section five examines the judicial narratives the judges and Justices told in *Torres*, from the district court to the Supreme Court, and traces those narratives to their origins. Section six looks at other Supreme Court civil rights cases that reveal fact bias. And section seven explores ways to correct fact bias.

II. Pleading Hurdles Lead to Factual Hurdles

Heightened pleading standards have impacted civil rights plaintiffs disparately.[34] The Supreme Court's interpretations of the Federal Rules of Civil Procedure have harmed civil rights plaintiffs' cases more than any other type of case aside from employment discrimination.[35] These changes have impacted how federal judges view the facts in civil rights cases, which is critical because that is where judicial review

[34] Stephen N. Subrin & Thomas O. Main, *The Fourth Era of American Civil Procedure*, 162 U. PA. L. REV. 1839, 1847 (2014); Schneider, *supra* note 4, at 519-22; Wasserman, *supra* note 6, at 1332.

[35] Suzette Malveaux, *A Diamond in the Rough: Trans-Substantivity of the Federal Rules of Civil Procedure and Its Detrimental Impact on Civil Rights*, 92 WASH. U. L. REV. 455, 464 (2014) (citing A. Benjamin Spencer, *Class Actions, Heightened Commonality, and Declining Access to Justice*, 93 B.U. L. REV. 441, 479-80 (2013)).

begins. It is important to briefly explore how this happened over time and the impact these changes continue to have today.

Civil rights litigation in the latter half of the 20th Century was largely successful because of pleading standards set out by the Federal Rules of Civil Procedure and interpreted by the Supreme Court.[36] In 1957, the Court in *Conley v. Gibson* unanimously held that "a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief."[37] This low threshold eliminated procedural roadblocks to cases with merit that may have otherwise expired during the early stages of litigation.[38] It allowed civil rights plaintiffs to have their day in court.[39] But it also increased the volume of civil rights litigation.[40]

In 2007, the Supreme Court revised the *Conley* standard in *Bell Atlantic Corp. v. Twombly*.[41] The Court replaced *Conley's* "no set of facts" standard with a plausibility standard for motions to dismiss: a complaint must allege "enough facts to state a claim to relief that is plausible on its face."[42] The *Twombly* Court excluded boilerplate language that stated a plaintiff in a motion to dismiss was to receive the benefit of the doubt.[43] In this way, *Twombly* created a gray area for judges, a space that leads to

[36] Cristina Calvar, *"Twiqbal": A Political Tool*, 37 J. LEGIS. 200, 208 (2012).
[37] Conley v. Gibson, 355 U.S. 41, 45-46 (1957).
[38] Calvar, *supra* note 36, at 208.
[39] *Id.*
[40] *Id.* at 209.
[41] Bell Atl. Corp. v. Twombly, 550 U.S. 544, 545 (2007).
[42] 129 S. Ct. 1937, 1950 (2009).
[43] Hatamyar, *supra* note 4, at 571.

varied outcomes.[44] However, scholars and critics typically overlook the following plaintiff-friendly language in *Twombly*:

> Asking for plausible grounds does not impose a probability requirement at the pleading stage; it simply calls for enough fact to raise a reasonable expectation that discovery will reveal evidence of [the legal claim raised in the plaintiff's complaint]. And, of course, a well-pleaded complaint may proceed even if it strikes a savvy judge that actual proof of those facts is improbable, and 'that a recovery is very remote and unlikely.'"[45]

Two years later, in *Iqbal v. Ashcroft*, the Court set out a two-pronged approach for motions to dismiss.[46] First, federal judges must identify and ignore unsupported legal conclusions.[47] Second, federal judges must apply the plausibility standard to all remaining allegations.[48] Courts may decide what facts are plausible from the facts pled in the complaint, from their own judicial experience, or using their own common sense.[49] They may even ignore factual assertions supported by physical evidence.[50] At the same time, *Iqbal* stated judges should accept as true all well-pled factual allegations.[51]

Judges after *Twombly* and *Iqbal* "enjoy broad discretion to parse the complaint and individual allegations and to screen aggressively for a story that resonates with them."[52] Judges have more authority to disbelieve the facts alleged in the plaintiff's complaint or believe a different story.[53] They may use their own common sense,

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[44] Malveaux, *supra* note 35, at 468-69.
[45] Twombly, 550 U.S. at 545 (quoting Scheuer v. Rhodes, 416 U.S. 232, 236 (1974)).
[46] 129 S. Ct. 1937, 1950 (2009).
[47] *Id.*
[48] *Id.*
[49] *Id.*
[50] Wasserman, *supra* note 6, at 1338-39 (praising the Supreme Court for not ignoring testimony and physical evidence in a civil rights case).
[51] Ashcroft v. Iqbal, 556 U.S. 662, 664 (2009).
[52] Wasserman, *supra* note at 5, at 177.
[53] *Id.*

assumptions, explanations, and experiences to find a plausible reason for the events that form the basis for the civil litigation.[54] They may look beyond the plaintiff's plausible facts and conclusion to more plausible facts and conclusions found elsewhere.[55] Sometimes this means looking to the defendant's motions, answers, and briefs, even though they are instructed by both Twombly and Iqbal to look only to the complaint.[56]

Shortly after the *Iqbal* opinion was released, scholars expressed concern that the new plausibility standard in motions to dismiss would disproportionately impact civil rights cases and would be a political tool to rid federal court dockets of them.[57] After all, before these decisions, judges were already concerned about the number of civil rights cases on their crowded dockets[58] and had been looking for ways to attack pleadings to restrict their volume.[59] The scholars were right to be concerned: the plausibility standard led to a greater number of civil rights cases being dismissed.[60]

Motions to dismiss are filed in civil rights cases far more often than in other civil cases and are granted more often too.[61] They have dramatically increased in use against pro se civil rights plaintiffs; after *Iqbal*, 85% of these claims are dismissed.[62] Motions to

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[54] *Id.*

[55] *Id.*

[56] *E.g.*, Wood v. Moss, 572 U.S. 744, 748 (2014) (the Ninth Circuit found the most plausible set of facts in the defendant's motion to dismiss).

[57] *E.g.*, Wasserman, *supra* note at 5, at 162 n.31; Calvar, *supra* note 36, at 209; Malveaux, *supra* note 35, at 476-79; Schneider, *supra* note 4, at 564.

[58] Deseriee A. Kennedy, *Processing Civil Rights Summary Judgment and Consumer Discrimination Claims*, 53 DEPAUL L. REV. 989, 1011 (2004).

[59] Robert G. Bone, *Twombly, Pleading Rules, and the Regulation of Court Access*, 94 IOWA L. REV. 873, 897 (2009).

[60] *E.g.*, Schneider, *supra* note 4, at 532, 549; Hatamyar, *supra* note 4, at 556.

[61] Hatamyar, *supra* note 4, at 604-06; Malveaux, *supra* note 35, at 475.

[62] Hatamyar, *supra* note 4, at 613-15.

dismiss have become the primary vehicle to dispose of civil rights claims.[63] Civil rights attorneys are now forced to pursue only the strongest of cases,[64] and even then success is rare.

The pleading changes have impacted civil litigation practice in other ways too. One area of change relates to motions for summary judgment. Fewer summary judgments are filed because more motions to dismiss are granted; of those filed, rulings often favor the defendant.[65] Seventy percent of motions for summary judgment are granted in civil rights cases.[66]

Discovery has also changed in relation to the new standards. Courts are incentivized to refuse discovery until after a case has survived a motion to dismiss.[67] The *Twombly* Court's rationale for setting the motion to dismiss bar higher was the cost of discovery on defendants.[68] Moreover, "*Iqbal's* express goal was to dismiss more civil-rights actions before discovery, with its attendant cost, burden, and distraction on public officials."[69] The prospect of having the case dismissed at the pleadings stage without discovery requires plaintiffs to plead their case in much more factual detail than they previously did.[70]

There are also policy concerns regarding *Twombly* and *Iqbal* related to civil rights litigation. There has been a shift away from policies that once were central to civil rights

[63] Wasserman, *supra* note 6, at 1334 (stating that due to the plausibility standard, it is harder for a civil rights plaintiff to survive a motion to dismiss).
[64] Eisenberg & Clermont, *supra* note 33, at 197.
[65] Schneider, *supra* note 4, at 541; Wasserman, *supra* note 6, at 1334.
[66] Schneider, *supra* note 4, at 548-49.
[67] Wasserman, *supra* note at 52, at 168.
[68] Twombly, 550 U.S. at 558-59.
[69] Wasserman, *supra* note 6, at 1333.
[70] Schneider, *supra* note 4, at 533.

cases: deterring official misconduct, giving civil rights plaintiffs access to courts, and compensating those whose rights were violated.[71] The *Iqbal* Court stated its plausibility standard would allow officials to do their jobs without threat of lawsuit, releasing officials, governments, and even courts from the burden and distraction of civil rights litigation.[72] The latter set of policies have been touted by some Supreme Court Justices since the 1980s.[73]

When it comes to civil rights cases, the Supreme Court's decisions over time reflect "consistent value choices to favor police power over individual rights."[74] Without discovery and civil rights lawsuits moving forward, it is harder to expose official misconduct or deter government agents from violating constitutional rights.[75] There is some evidence that bias in these cases begins before discovery or trial are on the horizon.

III. Judicial Bias in Civil Rights Cases

The plausibility standard allows federal courts an opportunity to judge the merits of the case, based upon facts, at the pleadings stage.[76] This standard has "opened the door to minute and searching judicial analysis of each factual and legal allegation in the

[71] Wasserman, *supra* note at 5, at 164; Wasserman, *supra* note 6, at 1332.
[72] Iqbal, 556 U.S. at 685–86.
[73] CHEMERINSKY, *supra* note 3, at 202 (stating that "the Burger Court was more concerned with protecting officers from the additional costs of defending meritless suits than with ensuring that injured individuals receive compensation for the wrongs they have suffered").
[74] CHEMERINSKY, *supra* note 3, at 33.
[75] Wasserman, *supra* note at 5, at 172; Schneider, *supra* note 4, at 556 ("cases become private, not public, adjudication").
[76] Hatamyar, *supra* note 4, at 625.

complaint."[77] Furthermore, it has pushed the microscopic analysis of the summary judgment phase to the motion to dismiss phase, which arises earlier in litigation.[78]

Civil rights plaintiffs would prefer the jury make factual assessments instead of a federal district court judge,[79] especially one predisposed to favor police officers. Scholars have raised concerns that during the motion to dismiss and summary judgment phases, federal judges can "slice and dice" facts from the pleadings, judge what is plausible and what is not, or decide whether the plaintiff's case lives to see another day in court.[80] A quick read over randomly selected civil rights opinions will lead even the most objective reader to determine many federal judges harbor biases in these cases. Scholars have identified some reasons for judicial bias. This section will discuss those and identify a few more.

First, many federal judges are ideologically conservative.[81] Republican presidents in the last four decades appointed more federal judges than Democrats.[82] One quarter of all current federal judges were appointed by President Trump.[83] Judicial scholars have observed that legal ideology and political ideology are reflected in federal judicial rulings on civil rights cases, especially among Supreme Court Justices.[84] Democrat-appointed Justices ruled against civil rights plaintiffs less than 30 percent of the time, whereas Republican-appointed Justices ruled against civil rights plaintiffs almost 60

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[77] Schneider, *supra* note 4, at 535.
[78] Eisenberg & Clermont, *supra* note 33, at 197.
[79] Schneider, *supra* note 4, at 542-43.
[80] *Id.* at 544-46.
[81] *Id.* at 563.
[82] John Gramlich, *How Trump Compares with Other Recent Presidents in Appointing Federal Judges*, PEW RESEARCH CENTER (January 13, 2021), https://www.pewresearch.org/fact-tank/2021/01/13/how-trump-compares-with-other-recent-presidents-in-appointing-federal-judges/
[83] *Id.*
[84] Epstein, *supra* note 31, at 2041-42.

percent of the time.[85] Federal district court judges appointed by President Reagan granted standing to "upperdog" litigants more often[86] and consistently ruled against plaintiffs suspected of criminal activity in the underlying facts of civil rights cases.[87] Erwin Chemerinsky observed conservative justices "have consistently refused to interpret the Constitution to limit police behavior," and from the Rehnquist Court onward, "the police almost always win."[88] Political ideology impacts appellate judges more than it does trial court judges, however.[89]

Second, federal judges are more likely to be white and male.[90] Age, gender, and race impact a person's view of civil rights cases, whether intentionally or unintentionally.[91] Perceptions of the realities of discrimination, unfair treatment, and even impartiality within the judicial system vary dramatically among people of different races.[92] After highlighting the homogeneity of the federal bench, one scholar expressed this concern: "Since *Iqbal*, what constitutes ample facts, and whether those facts appear plausible, are matters left to the presiding judge's discretion – whereas one judge may subjectively

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[85] *Id*. at 2043.
[86] Rowland & Todd, *supra* note 31, at 180-82.
[87] CHEMERINSKY, *supra* note 3, at 9.
[88] *Id*. at 9, 272.
[89] Andrew J. Wistrich *et. al*., *Heart Versus Head: Do Judges Follow the Law or Follow Their Feelings?*, 93 TEX. L. REV. 855, 899 (2015).
[90] Ramzi Kassem, *Implausible Realities: Iqbal's Entrenchment of Majority Group Skepticism Towards Discrimination Claims*, 114 PENN ST. L. REV. 1443, 1459 (2010); John Gramlich, *How Trump Compares with Other Recent Presidents in Appointing Federal Judges*, PEW RESEARCH CENTER (January 13, 2021), https://www.pewresearch.org/fact-tank/2021/01/13/how-trump-compares-with-other-recent-presidents-in-appointing-federal-judges/; Linda Qui, *"We Belong in These Spaces": Jackson's Successors Reflect on Her Nomination*, N.Y. TIMES (April 7, 2022) ("just 70 Black women have ever served as a federal judge, representing fewer than 2 percent of all such judges"), https://www.nytimes.com/2022/04/07/us/politics/ketanji-brown-jackson-harvard.html
[91] *Id*. at 563 (2010); Wistrich, *supra* note 89, at 873-74, 879, 886, 897 (stating that research establishes that gender plays a role in some decisions but not in others).
[92] Kassem, *supra* note 90, at 1459-60.

regard a claim as fanciful or implausible, another may permit a similar claim to proceed."[93]

Third, many federal judges, whether they are appointed at the district court level or circuit court level, are skeptical of civil rights claims.[94] They cannot identify with or understand civil rights plaintiffs.[95] Racism and classism play a role in this, along with the fact that many judges come from communities predisposed to believe law enforcement officers are the good guys.[96] Judicial bias may be more pronounced with civil rights parties who fit stereotypes or are viewed as unworthy.[97] "Many judges … tend to view [civil rights] cases as petty, involving whining plaintiffs complaining about … institutional matters, rather than important civil rights issues."[98] A judge's perception as it relates to the severity of the complaint's allegations influence the judge's actions.[99] Juries are more inclined to rule in favor of civil rights plaintiffs following trial than judges are following a bench trial.[100]

Fourth, judges make rulings based upon the parties' likeability and whether the plaintiff's claim is frivolous. Consider the unsympathetic civil rights plaintiffs and their ridiculous claims below. A retired police officer in Philadelphia assaulted and injured a policeman because he refused her entry through a private door to her grandkid's school, then sued the police department despite having suffered no discernable injuries.[101]

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[93] *Id*. at 1465.
[94] Schneider, *supra* note 4, at 564.
[95] *Id*.
[96] CHEMERINSKY, *supra* note 3, at 271.
[97] Eisenberg & Clermont, *supra* note 33, at 197, 208-09 (noting that contracts case parties may be interchangeable whereas civil rights parties are stereotypical).
[98] Schneider, *supra* note 4, at 564.
[99] Malveaux, *supra* note 35, at 467-68.
[100] Schneider, *supra* note 4, at 564.
[101] Cherry v. Garner, No. CIV.A. 03-CV-01696, 2004 WL 3019241, at *1 (E.D. Pa. Dec. 30, 2004).

Three Texas plaintiffs pushed for greater gun rights by trying to openly bring guns – later deemed toys, though their realistic features fooled security officers – into the Texas State Capitol during open legislative debates about guns.[102] The men declined numerous polite requests from security officers to take the guns back to their cars, were arrested, then personally sued the security guards for violating their Second Amendment rights.[103] Rowdy football fans on a plane refused to follow flight crew instructions, were arrested, pled guilty to interfering with a flight crew, then sued the police and prosecutors.[104] None of these plaintiffs or their claims bring to mind the purpose of the Civil Rights Act. The plaintiffs simply lashed out at others with meritless lawsuits after acting badly. None of these plaintiffs were successful.

Fifth, there are several miscellaneous reasons why federal judges dislike these cases. Judges face pressures to weed them out given their proliferation in federal court.[105] Some civil rights plaintiffs are overly litigious, filing multiple lawsuits against multiple defendants, over and over again.[106] Emotions influence judicial behavior; civil rights cases stir up emotions for and against plaintiffs and defendants.[107] It appears that judicial emotions played a role in *Torres v. Madrid*, judging by two of the fact sections written during the appellate process.

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[102] Holcomb v. McCraw, 262 F. Supp. 3d 437, 441 (W.D. Tex. 2017).
[103] *Id.*
[104] Taylor v. Gregg, 36 F.3d 453, 454-56 (5th Cir. 1994).
[105] Schneider, *supra* note 4, at 565-66.
[106] *E.g.*, Rolle v. West, No. 5:18-cv-8-Oc-30PRL, 2018 WL 3134417, *1-*3 (M.D. Fla., March 2, 2018) (plaintiff filed dozens of lawsuits alleging civil rights violations, all dismissed as frivolous, and he was sanctioned numerous times); Flood v. Schaefer, 754 Fed. App'x 130, 131 (3rd Cir. 2018) (court expresses frustration that plaintiff refiled dismissed case for the fourth time).
[107] Wistrich, *supra* note 89, at 856, 898-900.

IV. Judicial Bias Leads to Fact Bias: *Torres v. Madrid*

Torres v. Madrid is the perfect case to analyze factual bias in civil rights litigation. While the district court opinion and the Supreme Court's majority opinion viewed the facts through the correct lens, the Tenth Circuit's opinion and Gorsuch's dissent did not. Some of the underlying facts disputed by the parties were established with independent forensic evidence or audio recorded by officers at the scene. Other disputed facts were irrelevant to the legal issues. This case ultimately hinged on a legal issue, not a factual one. Yet the fact statements illustrate extreme bias played a role in the case's trajectory to the Supreme Court.

This section will describe the legal claims in the *Torres* case and the underlying facts. To determine how factual bias crept into the Tenth Circuit's decision and the Supreme Court's dissent, it is necessary to mine the facts as alleged in the motions, briefs, and filings, and found in the depositions and the record on appeal.

A. The Legal Claims

Torres is an excessive use of force case. An excessive force analysis requires the plaintiff to identify the constitutional right infringed by the use of force, which is usually the Fourth Amendment.[108] There is no excessive force standard unique to § 1983.[109] Instead, a valid excessive force claim must be evaluated using the Fourth Amendment's objective reasonableness standard.[110] The officer's right to detain or arrest a person necessarily involves a right to use some amount of threat of or actual physical force.[111]

[108] Graham v. Connor, 490 U.S. 386, 394 (1989).
[109] *Id.*
[110] *Id.* at 394-95.
[111] *Id.* at 396.

The question is whether the force was objectively reasonable, considering the totality of the circumstances.[112]

When courts look at the totality of the circumstances, they assess the following things: whether a crime was committed and its severity; whether the plaintiff threatened the safety of the officers or others; and whether the plaintiff resisted or evaded *arrest* by fleeing.[113] Officers can use deadly force only when they have probable cause to believe the suspect presents an imminent threat of serious bodily injury to them or others.[114]

The time to judge the reasonableness of the officer's actions is when they take place, not in hindsight.[115] Courts have recognized officers must "make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation."[116] The plaintiff bears the burden of proving the excessive force claim.[117] This burden appears extraordinarily high given the fact that plaintiffs rarely win excessive force cases, even when officers use deadly force.[118]

Torres sued two police officers who shot her in the back.[119] She alleged the officers, while operating under color of law, used unnecessary force that exceeded the degree of

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[112] *Id.*
[113] *Id.*
[114] Tennessee v. Garner, 471 U.S. 1, 11 (1985).
[115] Graham, 490 U.S. at 396.
[116] *Id.* at 397.
[117] Rivas-Villegas v. Cortesluna, 142 S. Ct. 4, 8 (2021).
[118] CHEMERINSKY, *supra* note 3, at 229-30, 271. Academics have pointed out the Fourth Amendment analysis in these cases does not help civil rights plaintiffs. Osagie K. Obasogie & Zachary Newman, *The Futile Fourth Amendment: Understanding Police Excessive Force Doctrine Through an Empirical Assessment of Graham v. Connor*, 112 NW. U. L. REV. 1465, 1497-1500 (2018).
[119] Civil Complaint for Violation of Civil Rights, Torres v. Madrid, 2016 WL 11658100 (D. N.M. Oct. 21, 2016) (No. 1:16-cv-01163-LF-KK).

force a reasonable officer would have used.[120] The defendants argued they were immune from suit due to qualified immunity and because Torres pled guilty to crimes following the incident.[121] Some of the facts of the case were hotly contested.

B. The Plaintiff's Facts

In her complaint and filings in the federal district court, Torres said that in the early morning hours of July 15, 2014, New Mexico State Police officers were executing an arrest warrant for Kayenta Jackson[122] at an Albuquerque apartment where she lived.[123] Jackson is a Black woman whereas Torres is a light-skinned Navajo woman.[124] The officers had seen photos of Jackson beforehand; she was wanted for forging checks.[125] Torres, on the other hand, was not connected to Jackson's crime, did not commit a crime in the officers' presence, nor did they suspect she had committed a crime.[126]

Torres gave a videotaped deposition in 2017, three years after the shooting and one year after she filed her civil rights lawsuit.[127] In it, she said before she was shot, she had dropped a friend off at an apartment complex, after a night of gambling at a local

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[120] *Id.*

[121] Defendants' Motion to Dismiss, Torres v. Madrid, 2017 WL 11483838 (D. N.M. May 4, 2017) (No. 1:16-cv-01163-LF-KK).

[122] The arrest warrant target's name is spelled differently throughout the filed documents in this case. This Article will use Kayenta, which is the spelling of the name in the plaintiff's initial complaint and the district court decision. Torres v. Madrid, No. 1:16-CV-01163-LF-KK, 2017 WL 4271318, at *1 (D. N.M. Sept. 22, 2017).

[123] Civil Complaint for Violation of Civil Rights, Torres v. Madrid, 2016 WL 11658100 (D. N.M. Oct. 21, 2016) (No. 1:16-cv-01163-LF-KK); Plaintiff's Response to Defendants' Motion to Dismiss at *5, Torres v. Madrid, 2017 WL 11483836 (D. N.M. May 16, 2017) (No. 1:16-cv-01163-LF-KK).

[124] Plaintiff's Response to Defendants' Motion to Dismiss, Torres v. Madrid, 2017 WL 11483836, *4 (D. N.M. May 16, 2017) (No. 1:16-cv-01163-LF-KK); Appellant's Appendix, *supra* note 19, at *199 (pages referenced are pdf page numbers, not record page numbers).

[125] Plaintiff's Response to Defendants' Motion to Dismiss, Torres v. Madrid, 2017 WL 11483836, *4 (D. N.M. May 16, 2017) (No. 1:16-cv-01163-LF-KK);

[126] *Id.* at *4-*5.

[127] Joint Appendix, *supra* note 19, at *11.

Casino.[128] It was dark outside when she drove her friend to her apartment, which was located in a bad area of town known for drug dealing.[129] Torres admitted that she and her friend were addicted to methamphetamine at the time, but had not used drugs for several days before the shooting.[130]

Torres was living out of her car.[131] After she dropped off her friend, she began to organize the contents of her car to find clothes to wear and clear out the trash her friends had left behind.[132] It started to rain,[133] so Torres got into her car and rummaged around to find a lighter so she could smoke a cigarette.[134]

While she was looking for a lighter, she heard someone try to open her locked car door; when she looked up and saw unfamiliar faces, she was frightened.[135] The strangers were wearing black clothing and sunglasses[136] and stood to the side of her car between her and a car parked beside her.[137] She thought they were carjackers.[138]

She looked down to put the car in drive, looked back up, then realized the strangers had guns.[139] She barely stepped on the gas and was bracing for the impact of gunshots when she heard a "boom" and saw the glass of her windshield shatter.[140] Though she had difficulty seeing through her broken windshield, she managed to drive out of the

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[128] *Id.* at *14-*15.
[129] *Id.* at *17; Appellant's Appendix, *supra* note 19, at *202.
[130] Appellant's Appendix, *supra* note 19, at *111.
[131] Joint Appendix, *supra* note 19, at *16, *19.
[132] *Id.* at *18.
[133] *Id.* at *19.
[134] *Id.* at *19.
[135] *Id.* at *20.
[136] *Id.* at *21.
[137] *Id.* at *22-*25.
[138] *Id.* at *23.
[139] *Id.* at *20.
[140] *Id.* at *20, *25.

parking lot, running over bushes and a curb, before turning onto a street to escape the armed strangers.[141]

As she drove, she realized one bullet had pierced her arm, paralyzing it.[142] At some point, a tire popped, which permanently disabled her car.[143] She got out of her car, spoke to a man nearby, laid down in the street, asked him to call the police, and told him someone was following her.[144] In a panic, she ran away, stole a nearby unoccupied vehicle, and drove to Grants, N.M., a city where a family member lived.[145] When she realized the severity of her injuries,[146] she asked for directions to a hospital in Grants, and sought help there.[147] As the doctors began to treat her, and determined her injuries required medical care they could not provide, she was airlifted to a hospital in Albuquerque and was arrested the next day.[148]

C. The Defendants' Facts

In their district court motions, the defendants said that four officers went to the apartment complex on June 15th to conduct surveillance on Jackson.[149] The two sued officers, Janice Madrid and Richard Williamson, along with their Sergeant, Jeff Smith, who witnessed the shooting, were deposed around the time Torres was deposed.[150] All of the parties' and witnesses' testimonies were included in the Tenth Circuit's

[141] *Id.* at *25-*26.
[142] *Id.* at *25.
[143] *Id.* at *26-*28.
[144] *Id.* at *27; Appellant's Appendix, *supra* note 19, at *208.
[145] Joint Appendix, *supra* note 19, at *27-*29.
[146] *Id.* at *30-*31.
[147] *Id.* at *32.
[148] *Id.* at *33-*34.
[149] Defendants' Motion to Dismiss, Torres v. Madrid, 2017 WL 11483838 (D. N.M. May 4, 2017) (No. 1:16-cv-01163-LF-KK).
[150] Joint Appendix, *supra* note 19, at *40-*113.

Appellant's Appendix and the Supreme Court's Joint Appendix. This section will examine each officer's deposition separately.

1. Officer Janice Madrid

In her deposition, Janice Madrid admitted she was new to investigations on the day she shot Torres.[151] That morning, she got to her office early to prepare for the day.[152] She and the others were not wearing the department's normal police uniform, but dark tactical gear with yellow police patches on their vests and the words "State Police" in yellow letters down the sides of their black shirt sleeves.[153] Madrid wore a video and audio recorder, but failed to properly turn on the video recorder.[154]

Madrid and the other officers knew Jackson, their arrest target, was charged with a white-collar crime.[155] She had no criminal history of violence, but she did associate with violent people.[156] Madrid was aware that Jackson was Black and had seen several photos of her beforehand.[157]

When the officers arrived at Jackson's apartment complex in unmarked vehicles, Madrid saw a woman, later identified as Torres, standing beside her car, facing the interior, with her driver's door open.[158] Madrid said she could not see Torres's facial features because it was raining and it was dark, but she was afraid she might leave before they could find out who she was.[159] As the officers walked up to the car, Torres

[151] *Id.* at *47.
[152] *Id.*
[153] Joint Appendix, *supra* note 19, at *50-*51, *57.
[154] *Id.* at *47.
[155] *Id.* at *42-*43.
[156] *Id.* at *43.
[157] *Id.* at *43; Appellant's Appendix, *supra* note 19, at *176.
[158] *Id.* at *46.
[159] *Id.* at *46.

got inside, and Madrid declared to the other officers, "We need to stop this chick."[160] The officers decided to initiate contact.[161]

As they approached Torres's vehicle, the officers yelled "Stop!"[162] Torres did not respond to the officers' orders; by then, she was moving around inside her car.[163] Madrid was unsure whether Torres had a gun inside the vehicle and she could not see inside the car.[164] However, she never saw a weapon, nor did Torres ever point a weapon at Madrid.[165]

When Torres drove forward, Madrid said she was standing in front of the vehicle, close to the front bumper.[166] Officer Williamson was standing on the driver's side.[167] As the car moved towards her, Madrid testified she faced the front bumper, and shot seven rounds through the windshield to protect herself.[168] She credited her training and God for allowing the car to pass by her without hitting her, even though she maintained her stance directly in front of the vehicle.[169]

Madrid was asked whether she was aware of a trajectory analysis that showed no bullets entered the vehicle from the front.[170] She denied seeing the analysis, and she refused to address it during her deposition.[171]

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[160] *Id.* at *49.
[161] *Id.* at *47.
[162] Joint Appendix, *supra* note 19, at *49-*51; Appellant's Appendix, *supra* note 19, at *179.
[163] Joint Appendix, *supra* note 19, at *55.
[164] *Id.* at *55.
[165] *Id.* at *55-*56.
[166] *Id.* at *51-*52, *61.
[167] *Id.* at *62.
[168] *Id.* at *53-*54, *61, *63.
[169] *Id.* at *53.
[170] *Id.* at *52.
[171] *Id.* at *52.

Madrid was aware that there were policies in place about when the use of force, including deadly force, was authorized.[172] She knew an officer is supposed to stop firing a weapon once the threat to life has ended.[173] She denied shooting through the back of the vehicle.[174] She also said it would be inappropriate to shoot at a vehicle when the officer's sole objective is to merely talk to the person inside.[175]

2. Sergeant Jeff Smith

Madrid's supervisor, Sergeant Jeff Smith, testified that when he arrived at the apartment complex at 6:30 in the morning, it was slightly dark outside, and it was drizzling.[176] The target of their arrest warrant, Jackson, was charged with forgery.[177] Sergeant Smith said any connection Jackson had with a violent male, who was not the target of their investigation, was discovered after the day of the shooting.[178] The male, Charles Robinson, was suspected of murder, domestic violence, and drug trafficking.[179]

Smith arrived in the second car with Madrid, moments after Williamson and Officer Ray White parked their car.[180] He saw a male run from Torres's car to an apartment and slam the front door; White followed the male and Smith followed White.[181] Madrid followed Williamson to the car with Torres in it.[182] Smith assumed Torres was the target of their arrest warrant.[183]

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[172] *Id.* at *41-*42.
[173] *Id.* at *63.
[174] *Id.* at *63-*65.
[175] *Id.* at *64-*65
[176] Appellant's Appendix, *supra* note 19, at *181.
[177] Joint Appendix, *supra* note 19, at *70.
[178] *Id.* at *70.
[179] *Id.* at *71.
[180] Appellant's Appendix, *supra* note 19, at *180-*81.
[181] *Id.*
[182] *Id.* at *181.
[183] Joint Appendix, *supra* note 19, at *68-*69.

None of the officers identified themselves as members of law enforcement, even though they were trained to do so.[184] Smith thought Madrid and Williamson yelled multiple times for Torres to "get out of the car" and to show them her hands before they began shooting.[185] But Smith was impeached at his deposition with the audio recording, which proved the two repeatedly yelled only, "Open the door!"[186]

Smith said Madrid and Williamson started shooting their guns quickly.[187] The shooting began within two to three seconds of his arriving at the apartment complex with Madrid, and 28 seconds from the time Williamson and White arrived before them.[188]

As Torres drove forward, Smith said her car moved slightly in Williamson's direction.[189] Both Madrid and Williamson pointed their guns at the car and shot into its sides.[190] They shot through the back of her vehicle when she passed them, even though neither of them was in danger of being hurt.[191]

Torres's attorney refreshed Smith's memory of the scene with a diagram he drew the day after the shooting.[192] In the diagram, Sergeant Smith drew Williamson and Madrid standing on the driver's side of Torres's car[193] and him standing on the passenger's side.[194] Despite earlier statements during his deposition to the contrary,

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[184] *Id.* at *68-*69, *85-*86.
[185] *Id.* at *81-*82, *85.
[186] *Id.* at *85
[187] *Id.* at *74.
[188] Appellant's Appendix, *supra* note 19, at *121, *181.
[189] Joint Appendix, *supra* note 19, at *81-*82.
[190] *Id.* at *76, *82.
[191] *Id.* at *82-*84.
[192] *Id.* at *71-*72.
[193] *Id.* at *74-*75.
[194] *Id.* at *76, *81-*82.

once he saw the diagram he drew, Sergeant Smith said Madrid never stood in front of Torres's car.[195]

3. Officer Richard Williamson

Richard Williamson testified in his deposition that when they arrived at the apartment complex, the sun was just rising and it was dim outside.[196] He saw two people standing beside a vehicle; he was sure neither person was Black.[197] He knew Torres was not Jackson.[198] He knew Jackson was charged with forgery.[199] But he learned as the investigation progressed that she did work in a criminal group with others who were violent.[200] He did not suspect Torres had committed a crime, nor did he see her commit a crime in his presence.[201]

As the officers approached the two people, Williamson admitted that they never identified themselves as police officers.[202] One person ran into the apartment and slammed the door while Torres, who was standing beside her car, got into her car, and started it.[203]

When Williamson got to Torres's car, he saw her moving her hands in the vehicle.[204] He never saw a weapon nor did he suspect she had one.[205] For a moment, Torres paused driving forward as if she was looking for an escape route; Williamson was

[195] *Id.* at *75-*76.
[196] *Id.* at *110.
[197] *Id.* at *92-*93, *96.
[198] *Id.* at *96.
[199] *Id.* at *96.
[200] *Id.* at *96-*97.
[201] *Id.* at *93, *110.
[202] *Id.* at *91, *110-*11.
[203] *Id.* at *94-*95.
[204] *Id.* at *99.
[205] *Id.* at *99-*100.

scared of being crushed between her car and another if she drove out of the parking space at an angle.[206] But she never turned the car in his direction.[207]

Nonetheless, he shot at her vehicle and continued shooting until she was no longer in his vicinity.[208] The last bullet he fired entered through the back window.[209] A report prepared by his employer indicated officers found thirteen spent casings at the scene and testimony indicated officers shot at the car fifteen times.[210]

Two days after the shooting, he drew Madrid standing to the side of Torres's car in a criminal investigation diagram.[211] Williamson also stated that the trajectory report proved the bullets entered through the side and back of the vehicle, not from the front.[212] He said that if Madrid had been in front of the vehicle shooting through the front windshield, her bullets' trajectory would have contradicted the findings of the ballistics and trajectory report.[213]

V. Tracing the Courts' Factual Narratives to Their Origins

Two facts with special legal significance – the officers shot Torres in an effort to seize her, and she successfully evaded their capture – factored into every court decision and the Supreme Court's oral arguments heavily.[214] Any of the courts could have used

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[206] *Id.* at *97-*98.
[207] *Id.*
[208] *Id.* at *98.
[209] *Id.* at *99.
[210] *Id.* at *104-*05, *16; Appellant's Appendix, *supra* note 19, at *115, *213.
[211] Joint Appendix, *supra* note 19, at *106-*07.
[212] *Id.* at *108-*09.
[213] *Id.*
[214] *E.g.*, Torres, 2018 WL 4148405, at *4 ("Because the officers did not stop Ms. Torres by shooting at her, there was no seizure, and she cannot prevail on her claims of excessive force."); Torres, 769 F. App'x at 657 ("Because Torres managed to elude police for at least a full day after being shot, there is no genuine issue of material fact as to whether she was seized when Officers Williamson and Madrid fired their weapons into her vehicle."); Oral Argument at *5-*41, Torres v. Madrid, 141 S. Ct. 989 (2021) (No. 19-292), 2020 WL 6203591.

those two facts alone, without citing others, to support their decisions. In fact, on remand, the Tenth Circuit's fact section included little else.[215]

The way the courts built their fact statements and whose narrative they followed is revealing. The Tenth Circuit and Gorsuch's fact sections expose bias, whereas the district court's and the Supreme Court's majority's fact statements do not. This section will examine the courts' factual narratives more closely to parse what influenced them.

A. *Relying Primarily on the Plaintiff's Facts*

Both the district court and Chief Justice Roberts followed a similar factual narrative pulled primarily from the plaintiff's pleadings. These two courts cited legal rules that indicated they were constrained to favor the plaintiff's facts.[216] The district court, when it denied the defendants' motion to dismiss,[217] began its factual narrative by stating it was bound to rely on Torres's facts in her complaint and to consider all those facts true for purposes of its ruling.[218] The court then recited the facts as Torres pled them and relied narrowly on those facts in ruling against the defendants.[219]

Torres survived the motion to dismiss stage of litigation but lost when the judge granted the defendants' motion for summary judgment.[220] The "undisputed facts" the court recited in that ruling included a few from the defendants' motions and depositions. For example, the court found that Jackson was connected to violent

[215] Torres v. Madrid, 845 F. App'x 803, 803 (10th Cir. 2021).

[216] Torres, 141 S. Ct. at 994 ("We recount the facts in the light most favorable to petitioner Roxanne Torres because the court below granted summary judgment to Officers Janice Madrid and Richard Williamson, the two respondents here."); Torres, 2017 WL 4271318, at *1 ("The facts are taken from the allegations in Ms. Torres's complaint, which the Court assumes are true for the purpose of this motion.")

[217] Torres, 2017 WL 4271318, at *1

[218] *Id.*

[219] *Id.* at *1-*4.

[220] Torres, 2017 WL 4271318, at *4.

criminals, even though two of the officers testified they learned this later in the investigation, after the shooting.[221] For Fourth Amendment purposes, courts must not consider facts officers learned later, only what they knew at the time.[222]

The district court relayed driving facts that suggested Torres drove recklessly after the shooting, facts the defendants repeated in their motions.[223] These facts had nothing to do with the shooting or the basis for the excessive force claim. The court also found the officers' tactical uniforms were clearly marked, but said Torres was illiterate and could not read the markings.[224]

Technically, Torres never disputed the timeline officers cited for connecting Jackson to a violent criminal ring or that, in a panic to escape car jackers, she drove through shrubs and over curbs to exit the parking lot quickly with a shattered window she could not see through. She did dispute seeing uniform markings that identified her perceived car jackers as officers.[225] Regardless, the court's factual account was not at odds with Torres's pleadings. None of the court's facts that originated from the defendants' motions and filings appeared to influence the judge's decision. Instead, the decision rested on the opinion that Torres was never seized, and therefore could not prevail on her excessive force claim.[226] In the end, the court used the facts to tell the

[221] Torres, 2018 WL 4148405, at *1; Joint Appendix, *supra* note 19, at *70, *96-*97 (Sergeant Smith said they did not know Kenyata was connected to the violent ringleader until later whereas Officer Williamson said this was a fact they learned as the investigation progressed).

[222] Graham, 490 U.S. at 396.

[223] Torres, 2018 WL 4148405, at *1. *E.g.*, Defendants' Amended Motion for Summary Judgment, Torres v. Madrid, 2017 WL 11483840, *6 (D. N.M., December 14, 2017).

[224] Torres, 2018 WL 4148405, at *1.

[225] *E.g.*, Plaintiff Roxanne Torres's Response to "Defendants' Motion to Dismiss or Motion for Judgment on the Pleadings on Plaintiff's Complaint on the Basis of Qualified Immunity and Other Grounds," Torres v. Madrid, 2017 WL 11483836, *6 (D. N.M., May 16, 2017).

[226] Torres, 2018 WL 4148405, at *2.

underlying story of what happened, favoring Torres's narrative, even when the court ruled against her based on its interpretation of the law.

Chief Justice Roberts likewise favored Torres's narrative in the majority opinion. He cited the legal standard of review in the first paragraph: courts must view the facts in the light most favorable of the nonmovant petitioner because the trial court granted the defendants' motion for summary judgment.[227] The court then relayed the facts in a way that mostly tracked Torres's account, with some dramatic touches and mild humor not found in the district court's opinion.

Chief Justice Roberts, along with Justices Breyer, Kagan, Kavanaugh, and Sotomayor, ultimately decided that Torres was seized by officers when they used physical force by shooting her with the intent to stop her, even if that force did not result in her immediate capture.[228]

B. *Misrepresentations, Slurs, and a Misrepresented Record Reveal Bias*

It is understandable that in some cases, appellate courts find the plaintiff's account not plausible, or decide legal issues without considering facts at all. But in Torres's case, both the Tenth Circuit's and Gorsuch's facts include personal attacks against her and support for the defendant-officers in ways that contradict the appellate record. In other words, there was evidence of factual bias.

The Tenth Circuit and Gorsuch created facts patterns based primarily on the defendants' filings, motions, and appellate briefs, sometimes lifting phrases and words directly from them. Importantly, the defendants stated they disputed only some of

[227] Torres, 141 S. Ct. at 994 (citing Tolan, 572 U.S. at 655–656.
[228] *Id*. at 1003.

Torres's pled facts at the trial court, yet on appeal, they disputed them all.[229] A similar shift happened between the trial court's decision and the decisions on appeal: Torres's facts, viewed as true by the district court, were viewed as dubious or fabricated on appeal. This section will examine several "facts" found in the Tenth Circuit and Gorsuch's opinions that are untrue, lack support from the record, or demonstrate bias. They will be described in the order in which they appear in those fact statements.

1. Officers Were Executing a Warrant for a Dangerous Criminal

Both fact statements began by asserting that the officers were at the apartment complex to arrest a suspect who was involved with organized crime, murder, and drug trafficking.[230] This is not true. Jackson had arrest warrants for two counts of forgery, offenses the officers themselves and the district court described as white-collar crimes.[231] Officers did not believe she was armed or violent.[232] Torres did not know Jackson, nor did she have any involvement in her crimes.[233] Sergeant Smith testified the dangerous man Jackson knew was not the subject of the surveillance on June 15th nor was his connection to Jackson even known at that time.[234]

This false characterization of Jackson's suspected crimes makes the officers' surveillance assignment and warrant execution sound more ominous and dangerous

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[229] *Compare* Defendants' Motion to Dismiss, Torres v. Madrid, 2017 WL 11483838 (D. N.M. May 4, 2017) (No. 1:16-cv-01163-LF-KK) (stating that for purposes of that motion, the defendants took as true some of Torres's facts, which included, among others, that officers stood beside the car), *with* Appellee's Response Brief, *Torres v. Madrid*, 2018 WL 5886839, *2 (10th Cir. Nov. 5, 2018) (defendants-appellees disagree with all facts alleged by Torres, claiming that none are supported by the record).

[230] Torres, 769 F. App'x at 655; Torres, 141 S. Ct. at 1003.

[231] Joint Appendix, *supra* note 19, at *42, *70, *96; Torres, 2018 WL 4148405, at *1; Kayenta Jackson Grand Jury Indictment, Cause No. CR-2016-001525 (filed with the District Clerk of Bernalillo County on May 19, 2016, on file with author.

[232] Joint Appendix, *supra* note 19, at *41-*43, *70; Appellant's Appendix, *supra* note 19, at *177.

[233] Appellant's Appendix, *supra* note 19, at *210.

[234] Joint Appendix, *supra* note 19, at *70-*71.

than it was. It may have been included to justify the officers' use of excessive force, since the severity of the underlying crime is a factor courts can consider.[235] This characterization came directly from the defendants' briefs and motions.[236]

2. Officers Believed Torres was Their Target

Gorsuch next stated that officers thought Torres was their suspect.[237] This was only partly true. Smith said he assumed she was, Madrid said she wanted to stop her in case she was, whereas Williamson knew Torres was not their target.[238] Gorsuch's statement was more assured than the fact statement in the officers' Supreme Court brief; in it, they stated they were *unsure* whether Torres was their arrest target.[239] Even that statement was untrue given Williamson's testimony that he knew Torres, who is Native American, was not Jackson, who is Black. Perhaps appellate counsel was trying to split the difference between Madrid's and Williamson's contradicting deposition testimony. Nevertheless, Gorsuch went beyond what the defendants had previously asserted and beyond what the Tenth Circuit stated, which was that the officers wanted to make contact with Torres in case she was the subject of their warrant.[240] His suggestion that officers believed she was their target justifies their attempt to stop her because it gives them probable cause for the seizure, when they in fact had none.

3. Torres Was a Fugitive

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[235] Graham, 490 U.S. at 394.

[236] Appellees' Response Brief at *2, Torres v. Madrid, 769 F. App'x 654, 655 (10th Cir. Nov. 5, 2018), 2018 WL 5886839 (citing its motion for summary judgment); Respondent's Brief in Opposition at *1, Torres v. Madrid, 141 S. Ct. 989 (2021) (No. 19-292), 2019 WL 6045398.

[237] Torres, 141 S. Ct. at 1003.

[238] Joint Appendix, *supra* note 19, at *49, *67, *92-*93.

[239] Brief of Respondent-Appellee at *1, Torres v. Madrid, 141 S. Ct. 989 (2021) (No. 19-292), 2020 WL 1372891.

[240] Torres, 769 F. App'x at 655.

Gorsuch emphasized that even though Torres was not the target of the arrest warrant on June 15th, she was the target of a *different* arrest warrant.[241] Torres did have a warrant out for a probation violation.[242] While this fact was never mentioned by the district court or the Tenth Circuit, the defendants' Supreme Court brief referenced an arrest warrant and mentioned it in trial court motions.[243] Gorsuch picked up on this fact, again, perhaps because (1) it indicated that had officers made contact with Torres, she would have been arrested, or (2) she was guilty of something.

4. Officers Merely Approached Torres

Both the Tenth Circuit and Gorsuch characterized the officers' movement towards Torres, once they were in the parking lot, as a mere approach.[244] This characterization paints the picture of officers calmly walking towards Torres, perhaps with a consensual encounter in mind. This is the way the defendants characterized it in their trial motions.[245] In their appellate brief to the Tenth Circuit, however, the defendants skipped over their approach entirely and went directly to the officers' trying to open Torres's car door.[246] The depositions paint a very different picture from the Courts' characterization.

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[241] Torres, 141 S. Ct. at 1003.

[242] Appellant's Appendix, *supra* note 19, at *110.

[243] Brief of Respondents at *3, Torres v. Madrid, 141 S. Ct. 989 (2021) (No. 19-292), 2020 WL 1372891; Defendants' Amended Motion for Summary Judgment, Torres v. Madrid, 2017 WL 11483840, *3 (D. N.M., December 14, 2017).

[244] Torres, 769 F. App'x at 655; Torres, 141 S. Ct. at 1003.

[245] Defendants' Amended Motion for Summary Judgment at *2, Torres v. Madrid, 2017 WL 11483840 (D. N.M., December 14, 2017).

[246] Appellees' Response Brief at *3, Torres v. Madrid, 769 F. App'x 654 (10th Cir. Nov. 5, 2018), 2018 WL 5886839.

The intent of the officers, from the beginning, was to stop Torres and prevent her from leaving the parking lot.[247] In other words, they had every intent to seize her before they formed the requisite probable cause. When Torres saw them standing beside her car, they had their guns drawn and pointed at her.[248] The officers were yelling at her to open the door.[249] Sergeant Smith said Madrid and Williamson began shooting their guns within two to three seconds of his and Madrid's arrival.[250] This characterization, which is based solely on the officers' depositions, sounds more like a violent arrest than a casual approach on foot.

This description was critical for Torres's civil rights case. For her to win on an excessive force claim, she had to establish the officers violated her Fourth Amendment rights against unreasonable seizure[251] and in doing so, used force that was objectively unreasonable.[252] The Tenth Circuit and Gorsuch found that she could not meet the first criteria: a seizure. But their characterization was misleading. By stating they approached her on foot without saying (1) their intent was to detain her without reasonable suspicion or arrest her without probable cause, (2) they were commanding her to open her door, (3) with their guns drawn and fired seconds later, the Courts ignored the early violations of the Fourth Amendment present and the officers' unlawful seizure of Torres.

5. Torres Meant to Evade the Police

[247] Joint Appendix, *supra* note 19, at *46-*49.
[248] *Id*. at *23
[249] *Id*. at *51, *81, *85
[250] *Id*. at *74.
[251] Torres, 141 S. Ct. at 995.
[252] Graham, 490 U.S. at 395.

This part of the narrative is remarkably similar when you compare the officers' account to Torres's. She said she did not see them making their way to her, whereas they characterize her movements as evasive. Given the standards for summary judgment on appeal, all courts should have favored Torres's account.[253] However, the Tenth Circuit and Justice Gorsuch adopted the defendants' versions of facts and discounted Torres's.

The Tenth Circuit reported that Torres got into her car when officers approached, and her friend ran inside his apartment.[254] Gorsuch's narrative paints Torres in a more sinister light. He said, when "she saw the officers walk toward her, Ms. Torres responded by getting in the car and hitting the gas."[255] There is nothing in the record that supports Gorsuch's narrative.

First, his account suggests Torres knew they were officers and saw them approach her. The record suggests otherwise. Four officers arrived in two unmarked cars.[256] They were wearing black tactical gear with some police markings on them, but they were not wearing standard police uniforms.[257] Torres was illiterate, and the district court determined she could not read the markings.[258] At no time did the defendants identify themselves as officers.[259] It was dark outside, dark enough for two of the three officers

[253] Tolan, 572 U.S. at 655-656.
[254] Torres, 769 F. App'x at 655.
[255] Torres, 141 S. Ct. at 1003.
[256] Joint Appendix, *supra* note 19, at *5; Appellees' Response Brief at *2, Torres v. Madrid, 769 F. App'x 654 (10th Cir. Nov. 5, 2018), 2018 WL 5886839; Appellant's Appendix, *supra* note 19, at *123, *176, *180.
[257] Joint Appendix, *supra* note 19, at *50-*51
[258] Torres, 2018 WL 4148405, at *1.
[259] Joint Appendix, *supra* note 19, at *50-*51, *69, *110-*11.

to say they could not see her facial features, and dark enough for Torres not to see any markings identifying them as officers.[260]

Second, it is not clear Torres saw the officers approaching her. While Torres's account was consistent,[261] the defendants' accounts were not. In their motion for summary judgment and in their appellate brief before the Tenth Circuit, the defendants said Torres was already in her car with the motor running when officers got to her car.[262] In their Supreme Court brief, the defendants stated Torres got in the car and started it as soon as they approached.[263] In their depositions, all of the officers said Torres get in her car as they approached,[264] but Madrid never indicated Torres saw them, whereas Smith and Williamson implied she attempted to avoid them.[265] Given all the contradictions, it is remarkable Gorsuch sounded so sure of this fact.

Third, Gorsuch stated that when Torres saw the officers, her response was to get into her car. The district court found that Torres was already seated in her car with her door locked when officers reached her. [266] Torres stated she had just gotten in the car, after cleaning it out, because it had started to rain and she was looking for her cigarette lighter.[267] Given the fact that officers were driving an unmarked car, wearing black

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[260] *Id*. at *6, *17, *54-*56, *95, *110.

[261] Appellant's Reply Brief at *3, Torres v. Madrid, 769 F. App'x 654 (10th Cir. Nov. 16, 2018) (No. 18-2134), 2018 WL 6044777; Petition for a Writ of Certiorari at *5, Torres v. Madrid, 141 S. Ct. 989 (2021) (No. 19-292), 2019 WL 4203519.

[262] Defendants' Amended Motion for Summary Judgment, Torres v. Madrid, 2017 WL 11483840, *6 (D. N.M., December 14, 2017); Appellees' Response Brief at *2, Torres v. Madrid, 769 F. App'x 654 (10th Cir. Nov. 5, 2018) (No. 18-2134), 2018 WL 5886839; Appellant's Reply Brief at *3, Torres v. Madrid, 769 F. App'x 654 (10th Cir. Nov. 16, 2018) (No. 18-2134), 2018 WL 6044777.

[263] Respondent's Brief in Opposition at *1, Torres v. Madrid, 141 S. Ct. 989 (2021) (No. 19-292), 2019 WL 6045398.

[264] Joint Appendix, *supra* note 19, at *49, *86-*87, *93-*94.

[265] *Id*. at *86-*87.

[266] Torres, 2018 WL 4148405, at *1.

[267] Joint Appendix, *supra* note 19, at *18-*20, *54-*55.

tactical gear, it was dark, and it was raining, it is certainly plausible that Torres's account was true: she got into her car to avoid getting wet seconds before police officers stood beside her car, yelling with guns drawn.

There is absolutely no support in the record or in any of the depositions, motions, pleadings, or briefs for Gorsuch's statement that Torres stepped on the gas as soon as she saw the officers. Torres said she did not accelerate until she saw guns pointed at her, and only then she barely stepped on the gas, driving one foot forward, as she braced for gunshots, before leaving the parking lot.[268] Even the officer's testimony supported this fact: Williamson described a moment when Torres paused and stopped before driving forward again.[269]

The only difference between the officers' accounts and Torres's is (1) she either saw the officers and got in her car to avoid them, which was her right, given the fact officers lacked reasonable suspicion to detain her, or (2) she did not see them and got into her car for other reasons. Given the legal standard for reviewing motions for summary judgment, Gorsuch should have viewed the slight differences in Torres's favor. Her account was plausible.

6. Torres was High on Drugs

This next allegation was highly misleading. It was used by the defendants, the Tenth Circuit, and Gorsuch to make Torres look guilty of other criminal activity – possession of drugs, public intoxication, driving under the influence – or more generally of being an addict or a blameworthy civil rights defendant. The defendants in their

[268] *Id.* at *20, *23.
[269] *Id.* at *98.

motion for summary judgment said in the first line of their "undisputed facts" that Torres was "strung out" on methamphetamine on the day of the shooting.[270] The district court made no mention of her drug addiction in its decisions.

In their appellate brief to the Tenth Circuit, the defendants said that Torres had been on a drug binge for several days.[271] The Tenth Circuit, in its fact statement, said Torres "was 'tripping … out' from having used meth 'for a couple of days'" and later in its narrative, mentioned a variation of this quote a second time.[272] Perhaps picking up on the Tenth Circuit's emphasis, the defendants in their Supreme Court brief said that Torres was "tripping out bad" after having used meth for two days.[273] Gorsuch then used this exact phrase to describe Torres in his fact statement.[274]

There are several truly unfortunate things about the use of these words. First, the quotes – "strung out" and "tripping out" – were not Torres's. They were characterized in both opinions to make it sound like Torres said this about herself. But they were the words of the defendants' lawyer, James Sullivan; he spoke these words during Torres's deposition.[275]

Not only were they defense counsel's words, but they were also taken out of context. The questions Sullivan asked Torres when he used these words related to why she did not ask others for help once she realized the extent of her injuries and saw she was

[270] Defendants' Amended Motion for Summary Judgment, Torres v. Madrid, 2017 WL 11483840, *3 (D. N.M., December 14, 2017).

[271] Appellees' Response Brief at *4, Torres v. Madrid, 769 F. App'x 654 (10th Cir. Nov. 5, 2018), 2018 WL 5886839.

[272] Torres, 769 F. App'x at 655-56.

[273] Brief of Respondent-Appellee at *3, Torres v. Madrid, 141 S. Ct. 989 (2021) (No. 19-292), 2020 WL 1372891.

[274] Torres, 141 S. Ct. at 1003.

[275] Appellant's Appendix, *supra* note 19, at *103, *110-*11.

losing a lot of blood.[276] She replied she could not seek others' help because she was covered in blood.[277] She reasoned that people put up with a lot of horrible things when they have addictions.[278] At that time, maintaining her addiction was more important than anything else, including taking measures to save her own life.[279]

When the defendants' attorney asked if she was strung out, her reply was "bad."[280] When he asked if this was on the night before the shooting, she at first replied, "Yeah."[281] But she immediately corrected her reply by saying she had used methamphetamines for two days earlier in the week, but for several days before the shooting, she had not used any drugs at all.[282] On June 15th, she was experiencing physical withdrawal.[283] Roberts correctly stated this in his fact statement.[284]

On the day Torres was shot, she had not slept for days, and her mind was not in a good place, especially when she realized she had been shot and might die from blood loss.[285] She did use the word "trip" but only to describe what withdrawal and a lack of sleep do to an addict's mental state.[286] Regardless, Torres was not high at the time she was shot. Had she been high, it still would not justify the officers' actions of shooting her in the back as she drove away from them.

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[276] *Id.* at *110-*11.
[277] *Id.*
[278] *Id.* at *111.
[279] *Id.*
[280] *Id.*
[281] *Id.*
[282] *Id.*
[283] *Id.*
[284] Torres, 141 S. Ct. at 994.
[285] Appellant's Appendix, *supra* note 19, at *111.
[286] *Id.*

Torres's attorney stated in a Tenth Circuit reply brief that using drug descriptors was a tactic the defendants employed to "blame the victim" by making "allegations that have nothing to do with why the shooting took place."[287] It is not surprising that attorneys for police officers would paint the victim in a negative light to make the officers look better by comparison. But federal appellate court judges and Supreme Court Justices should be above using smear tactics on civil rights plaintiffs.

That the Tenth Circuit and Justice Gorsuch took an attorney's words and attributed them to Torres, then mischaracterized her drug use at the time she was shot reveals extreme bias. They either relied exclusively on the defendants' briefing narratives and did not read the record, or they viewed the record in such a biased way as to mischaracterize the facts in the precise way the defendants did in their briefs. Given the fact that the Supreme Court's majority opinion recognized she was experiencing withdrawal, all signs point to the former. Regardless, either explanation falls short of the light most favorable standard.

In *Scott v. Harris*, Justice Scalia wrote, "When opposing parties tell two different stories, one of which is blatantly contradicted by the record… a court should not adopt that version of the facts for purposes of ruling on a motion for summary judgment."[288] In the *Scott* case, Scalia was referring to a videotape that contradicted the civil rights plaintiff's pleadings;[289] his statement should equally apply to the drug use facts contradicted by the record, espoused by the defendants, and believed by the Tenth Circuit and Gorsuch. The bigger question is why this mischaracterized narrative was

[287] Appellant's Reply Brief at *2, Torres v. Madrid, 769 F. App'x 654 (10th Cir. Nov. 16, 2018) (No. 18-2134), 2018 WL 6044777.
[288] Scott v. Harris, 550 U.S. 372, 380 (2007).
[289] *Id*. at 378-81.

even included in a case that rested, for all judges and justices, on a legal issue, not a factual one?

7. Police Officers Shot Torres to Prevent her from Running them Over

An assertion critical to the defense was that Madrid and Williamson only shot Torres to prevent her from wounding or killing them. They argued the shooting was reasonable, and not excessive use of force, because she threatened their safety.[290] The narrative in both the Tenth Circuit's and Gorsuch's facts follows the defendants' characterization.

In the motion for summary judgment, the defendants suggested the officers shot Torres to protect themselves.[291] The Tenth Circuit's fact section explained each defendant's perspective, as well as Torres's belief that she was trying to get away from armed carjackers.[292] While this may appear like a neutral posture – explaining all perspectives – the standard on appeal required them to view and report the facts in a light most favorable to Torres.[293] Chief Justice Roberts acknowledged this in his own fact statement.[294]

Gorsuch's account was much more biased than the Tenth Circuit's. He told the story from the defendants' perspective, namely Madrid's.[295] He wrote, "Fearing the oncoming car was about to hit them, the officers fired their duty weapons, and two

[290] Graham, 490 U.S. at 396.
[291] Defendants' Amended Motion for Summary Judgment at *5, Torres v. Madrid, 2017 WL 11483840, (D. N.M., December 14, 2017).
[292] Torres, 769 F. App'x at 655-56.
[293] Tolan, 572 U.S. at 655–656.
[294] Torres, 141 S. Ct. at 994.
[295] *Id*. at 1003.

bullets struck Ms. Torres while others hit her car."[296] His use of the word "oncoming" supports Madrid's testimony that she stood directly in front of Torres's car, firing her gun through the front windshield, as Torres's vehicle "lunged" at her, yet she miraculously escaped being hit.[297] However, the criminal investigation launched by Madrid's employer and the other two officers' testimony directly contradicted Madrid's account.

The day after the shooting, the New Mexico State Police (NMSP) launched a criminal investigation into the officers' conduct, as well as an Internal Affairs investigation.[298] An NMSP lieutenant interviewed Madrid, Smith, and Williamson.[299] Smith and Williamson drew diagrams of the officers' positions at the time Torres drove away and the shooting began.[300] In both officers' diagrams, Madrid stood to the side of Torres's vehicle.[301] Torres also placed Madrid beside her car in her own diagram.[302] So why did Gorsuch use the word "oncoming" and rely on Madrid's testimony when it was contradicted by every other person there that day?[303]

Not only did the diagram and the testimony contradict Madrid, but so did her employer's trajectory report.[304] All bullets entered Torres's car from the side and the back.[305] Gorsuch, in his fact statement, focused only on Madrid's perception, not on the

[296] *Id.*
[297] Appellant's Appendix, *supra* note 19, at *117-*18, *120.
[298] *Id.* at *119, *127, *178, *182, *188.
[299] *Id.* at *127, *182.
[300] *Id.* at *190, *214.
[301] *Id.*
[302] *Id.* at *110.
[303] *Id.* at *182-*85.
[304] Joint Appendix, *supra* note 19, at *108-*09.
[305] Appellant's Appendix, *supra* note 19, at *184.

contradictory testimony or forensic evidence. This allegation came from the defendants' Supreme Court brief.[306]

8. Other Facts Designed to Malign Torres

In Gorsuch's fact section, he used other irrelevant facts to make Torres look unworthy. He said she drove erratically, collided with another car, stole another car, was eventually arrested, and pled no contest to assaulting officers.[307] All of these facts were included by the defendants in their brief to the Supreme Court.[308] In Torres's Tenth Circuit brief, she said the defendants left out important details from the depositions and record when they reiterated these facts.[309] Regardless, none of those facts are relevant to whether she was seized for purposes of the Fourth Amendment, which was the central legal and factual issue in the case.

Gorsuch's fact statement is problematic, not just for what it includes and excludes, but for its design and purpose. Gorsuch is widely known as a skilled writer and an appellate judge with years of experience. His biased fact statement and disregard of the record appear calculated to have a persuasive effect of dehumanizing Torres and exalting the officers. If the facts, as Gorsuch saw them, ultimately did not matter legally, then why recount them in such a biased way? Why take word-for-word what the defendants' attorneys said when Torres's account should be favored? And why believe

[306] Brief of Respondent-Appellee at *3, *6, Torres v. Madrid, 141 S. Ct. 989 (2021) (No. 19-292), 2020 WL 1372891.

[307] Torres, 141 S. Ct. at 1004.

[308] Brief of Respondent-Appellee at *3-*4, Torres v. Madrid, 141 S. Ct. 989 (2021) (No. 19-292), 2020 WL 1372891.

[309] Appellant's Reply Brief at *3, Torres v. Madrid, 769 F. App'x 654 (10th Cir. Nov. 16, 2018) (No. 18-2134), 2018 WL 6044777.

police officers who were impeached with prior inconsistent statements time and time again, and whose factual accounts varied so much from each other in critical ways?

What about her outstanding arrest warrant or her prior drug use justifies being shot in the back? Why were these facts worth including when they had no legal significance? They go to the appellate judges' and Justices' opinion of Torres as a worthy plaintiff. They were used to justify the officers' actions. This is not the first time the Supreme Court and the lower federal courts have taken this approach in a civil rights case.

VI. View Confusion in Other Supreme Court Civil Rights Cases

Other civil rights plaintiffs who have appeared before the Supreme Court have suffered the same fate as Torres: their facts have been told in both the most favorable light and the least favorable light, depending on the judge. If courts are constrained to view the facts most favorably towards the nonmoving party, not all of them understand what "most favorably" means.

In 2018, the Supreme Court decided *Kisela v. Hughes*, an excessive use of force civil rights case with several factual similarities to *Torres*.[310] The Arizona district court judge in that case found that the defendant-officer had qualified immunity and granted his motion for summary judgment.[311] The fact statement heavily favored the defendant, even though the court stated it was constrained to view the facts in the light most favorable to the plaintiff.[312] The court indicated, through its fact statement, that

[310] Kisela v. Hughes, 138 S. Ct. 1148, 1150 (2018).
[311] Hughes v. Kisela, No. CV 11-366 TUC FRZ, 2013 WL 12188383, at *1–2 (D. Ariz. Dec. 20, 2013).
[312] *Id.* at *2.

Corporal Andrew Kisela was justified in shooting the plaintiff, Amy Hughes, a mentally ill woman, who refused to put a kitchen knife down after being ordered to do so.[313]

On appeal, the Ninth Circuit took the opposite view.[314] It emphasized the officers were inexperienced, they knew the woman suffered from mental illness, Hughes was calm, her roommate, standing several feet away, was not in danger, the knife was held in a non-threatening manner, a fence separated the police from the plaintiff so she posed no threat to them, and Kisela was rash in shooting her.[315] Moreover, Kisela's account – that he had to shoot her because the knife was raised toward her roommate in a threatening manner – was contradicted by two other officers on the scene.[316] Again, the Court stated it was obligated to view the record in the light most favorable to the plaintiff and that is what it did.[317] The contrast between the Ninth Circuit's facts and the district court's facts was stark, yet they both stated they were looking at the facts in the light most favorable to Hughes.

There was also a stark contrast between the Supreme Court majority's facts and the dissent's facts.[318] The majority decision, a per curium opinion joined by all but Justices Sotomayor and Ginsburg, began with the following sentence: "The record, viewed in the light most favorable to Hughes, shows the following."[319] The majority's fact statement mirrors the tone of the district court's, but adds facts indicating the plaintiff was mentally deranged and acted as a threat to others moments before Kisela shot her.[320]

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[313] *Id.*
[314] Hughes v. Kisela, 841 F.3d 1081, 1083 (9th Cir. 2016).
[315] *Id.* at 1083-84.
[316] *Id.*
[317] *Id.* at 1084.
[318] Kisela v. Hughes, 138 S. Ct. 1148, 1150-51, 1155-56 (2018).
[319] *Id.* at 1150.
[320] *Id.* at 1150-51.

Not surprisingly, the majority ruled that Kisela acted reasonably and was thus protected by qualified immunity.[321]

Sotomayor's dissent began with the assertion that *her* fact statement, not the majority's fact statement, favored the plaintiff:

> This case arrives at our doorstep on summary judgment, so we must "view the evidence … in the light most favorable to" Hughes, the nonmovant, "with respect to the central facts of this case." The majority purports to honor this well-settled principle, but its efforts fall short. Although the majority sets forth most of the relevant events that transpired, it conspicuously omits several critical facts and draws premature inferences that bear on the qualified-immunity inquiry. Those errors are fatal to its analysis, because properly construing all of the facts in the light most favorable to Hughes, and drawing all inferences in her favor, a jury could find that the following events occurred on the day of Hughes' encounter with the Tucson police.[322]

Sotomayor's fact statement heavily favored the plaintiff's pleadings and painted Kisela as acting hastily, and as an inexperienced and dishonest law enforcement officer.[323] It painted Hughes as a woman who acted in a calm, non-threatening way, and as someone whose mental illness may even have impaired her ability to understand officers had responded to the scene.[324] Sotomayor carefully consulted the appellate record.[325] She, along with Ginsburg, would have found Kisela's conduct unlawful.[326]

What *Kisela* demonstrates is that nearly all federal judges (1) believe they are viewing the facts in the light most favorable to the civil rights plaintiff or (2) just say they are. This begets the question: does their view of the parties from the outset shape their view of the facts or are the facts used to justify their outcomes? Is it even possible

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[321] *Id*. at 1152.
[322] Kisela v. Hughes, 138 S. Ct. 1148, 1155 (2018) (J. Sotomayor, dissenting).
offcer[323] *Id*. at 1155-56.
[324] *Id*. at 1155-56.
[325] *Id*.
[326] *Id*. at 1161.

for federal judges with lives so different than most civil rights plaintiffs to view the facts in the light *most* favorable to these parties? Or does *Iqbal's* plausibility test give federal judges license to play with the facts? Whatever the answers, this is certain: all the *Kisela* judges and Justices, from the district court to the Supreme Court, said they were viewing the facts in the light most favorable to the plaintiff, but two of the fact statements were indeed most favorable to Hughes while two were most unfavorable. Not surprisingly, the judicial outcomes were predictable after reading the fact statements alone.

Another civil rights case with significant discrepancies between judicial fact statements is one the *Torres* majority referenced for its most favorable view standard:[327] *Tolan v. Cotton*.[328] In fact, the entire point of the *Tolan* decision was to emphasize the importance of drawing all inferences – especially in civil rights cases where qualified immunity is raised – in favor of the nonmoving party.[329]

The facts of *Tolan* were hotly contested, so much so that the district court spent fourteen pages describing agreed upon and disputed facts separately, as well as facts, questions, and answers from the witnesses' depositions.[330] In *Tolan*, an officer saw Robert Tolan and his friend park a car on a street in front of a house.[331] While checking the status of the car, the officer incorrectly typed the license plate number.[332] The one he typed was associated with a stolen car.[333] Falsely believing the men were driving a

[327] Torres, 141 S. Ct. at 994.
[328] Tolan, 572 U.S. at 651.
[329] *Id.* at 657.
[330] Tolan v. Cotton, 854 F. Supp. 2d 444, 448-61 (S.D. Tex. 2012).
[331] *Id.* at 448-50.
[332] *Id.* at 450-51.
[333] *Id.* at 450-51.

stolen car, the officer ordered the young men to the ground, held them at gunpoint, and waited for backup officers.[334] When Tolan's parents came outside and tried to explain the car was theirs and the officers were mistaken, tempers among all parties flared, and officers shot Tolan after he yelled at the officers to leave his mother alone.[335]

The district judge used at least a dozen qualifiers to restrict "the light most favorable to the nonmovant party" standard.[336] She did not recount the facts in a light most favorable to the plaintiffs and ultimately ruled in favor of the officer-defendant.[337] Tolan appealed to the Fifth Circuit.[338]

The Fifth Circuit began its fact statement with these words: "the following facts are presented, as they must be on summary-judgment review, in the light most favorable to" Tolan.[339] But what followed was unfavorable to Tolan. The Fifth Circuit commended the trial judge for her "extremely detailed and well-reasoned opinion."[340] The Court then described a chaotic scene, an outnumbered officer, angry and combative felony suspects, and a shot plaintiff who may have been reaching for a gun, according to the officer who shot him.[341] The defendant-officer won, and Tolan appealed to the Supreme Court.[342]

The Supreme Court's fact statement, which begins with the "light most favorable" standard, is indeed the most favorable of the three.[343] The Court did discuss disputed

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[334] *Id.* at 450-51.
[335] *Id.* at 451-61.
[336] *Id.*
[337] *Id.* at 477.
[338] Tolan v. Cotton, 713 F.3d 299, 301 (5th Cir. 2013).
[339] *Id.*
[340] *Id.* at 303.
[341] *Id.* at 301-03.
[342] *Id.* at 308.
[343] Tolan, 572 U.S. at 651.

facts, which could be considered veering into neutrality, not plaintiff-favorable territory.[344] But instead of focusing on the scared, outnumbered, heroic officer, the court concluded with facts about the plaintiffs' injuries, lifelong pain, and prematurely ended professional sports career, all of which stemmed from the officer's decision to shoot a man without warning who was concerned that officers were assaulting his mom.[345]

The sole point of the *Tolan* decision was to right the factual perspective of judges in civil rights cases with qualified immunity claims.[346] The Court stated that regardless of the process judges take when examining excessive force claims where qualified immunity is raised, "courts may not resolve genuine disputes of fact in favor of the party seeking summary judgment."[347] The Court said the Fifth Circuit erred by improperly weighing facts and resolving disputes in the officer's favor, and omitting contradictory facts.[348] It then provided several specific examples illustrating the facts were not viewed by the Fifth Circuit in the light most favorable to Tolan.[349]

Before remanding the case back to the Fifth Circuit, the Supreme Court said,

> [T]he court below credited the evidence of the party seeking summary judgment and failed properly to acknowledge key evidence offered by the party opposing that motion. And while "this Court is not equipped to correct every perceived error coming from the lower federal courts," we intervene here because the opinion below reflects a clear misapprehension of summary judgment standards in light of our precedents. …
>
> By weighing the evidence and reaching factual inferences contrary to Tolan's competent evidence, the court below neglected to adhere to the

[344] *Id*. at 653.
[345] *Id*. at 653-54.
[346] *Id*. at 653-54.
[347] *Id*. at 656.
[348] *Id*. at 657.
[349] *Id*. at 657-59.

> fundamental principle that at the summary judgment stage, reasonable inferences should be drawn in favor of the nonmoving party.[350]

In the end, the majority reigned the Fifth Circuit in, along with other federal judges with the same inclination to favor the summary judgment proponent.

Justices Alito and Scalia concurred in the decision to remand the case to the Fifth Circuit.[351] The basis for their concurrence was that on *these* facts, granting summary judgment was wrong.[352] But they also said that there was no confusion among the federal courts of appeals about the standard of review following summary judgment.[353] Nevertheless, what "most favorable" means, based upon the various judicial fact statements in *Torres*, *Kisela*, and *Tolan*, depends on whether the judge has biases in favor of police officers and against civil rights plaintiffs.

VII. Righting Fact Bias

There are several ways courts and federal judges can eliminate fact bias. First, they must recognize implicit and explicit bias against civil rights plaintiffs and their cases exist. This should not be difficult given that *Tolan's* sole purpose was to remedy biased factual views in civil rights cases in federal trial and appellate courts. Yet, *Torres* reveals the problem remains.

Second, judges must remember the standard surrounding the appropriate view of facts is objective, even if the plausibility standard has been characterized as more subjective. While *Twombly* failed to address the way courts should view the facts

[350] *Id.* at 659-60.
[351] *Id.* at 662.
[352] *Id.* at 661.
[353] *Id.*

following a motion to dismiss,[354] *Iqbal* clarified that trial courts should accept as true all well-pled factual allegations.[355] The Supreme Court's mandates from *Iqbal* and *Tolan* factual review remain: for purposes of motions to dismiss and motions for summary judgment, federal judges should view the facts in the light most favorable and resolve inferences in favor of the nonmovant.[356] That did not happen in *Torres*; both the Tenth Circuit and Gorsuch resolved *every* disputed fact and inference in favor of the officers.

Third, it is not only important to view the facts and resolve inferences in favor of the nonmovant, but courts must consider, apply the law to, and recite the facts in a way that honors this view. It is hard to believe a court that includes the standard and claims it is reciting the facts in a way that favors the nonmovant when the fact statement and the law's application contradict the standard. Saying one thing and doing another is confusing and disingenuous at best. If the Supreme Court does not adhere to the most favorable standard in its own fact statements (*e.g.*, the *Kisela* majority), or Justices disregard the standard altogether (*e.g.*, the *Torres* dissent), how can the lower federal court judges be expected to adhere to it?

Fourth, courts need to recognize that a neutral fact statement, or one that tells everyone's perspective, does not meet the most favorable standard. Some federal judges bifurcate fact sections into undisputed and disputed facts, taking a neutral pleadings stance.[357] While it is true that the judge's role often requires neutrality as a starting point, as soon as a judge takes an impartial or balanced view toward the facts in a civil

[354] Hatamyar, *supra* note 4, at 571.
[355] Iqbal, 556 U.S. at 664.
[356] *Id.*; Tolan, 572 U.S. at 656-60.
[357] *E.g.*, Lock v. Torres, 694 F. App'x 960, 962 (5th Cir. 2017).

rights case where a motion for summary judgment or a motion to dismiss is involved, the judge has already violated the legal standards required for those two motions.

Fifth, judges must keep in mind that the defendant's objectives in the motions, filings, replies, and briefs vary considerably from the judge's responsibilities. It is the job of the defense lawyers to characterize facts in ways that are unfavorable to the plaintiff and favorable to the accused. Defense counsel will say the plaintiff's pleadings are speculative or conclusory.[358] That does not mean the judge should view them that way.

Defense counsel may even say she considers the plaintiff's facts as true, all the while doing everything possible to undercut them.[359] For example, Torres stated in her reply brief before the Supreme Court that the respondents relied upon their own deposition testimony for their facts when the evidence in the record contradicted their testimony.[360] The defendants cherry picked the record.[361] But the standards of *Iqbal* and *Tolan* do not apply to defendants and their attorneys, they apply to judges. When judges cut and paste the facts, taken directly from the defendants' motions, filings, and briefs – as the Tenth Circuit and Justice Gorsuch did in *Torres*– they abandon the lens they are mandated to use. They turn to biased accounts to inform them, which leads to judicial bias.

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[358] *E.g.*, Defendants' Reply in Support of their Motion for Summary Judgment, Torres v. Madrid, No. No. 16-CV-01163 LF/KK, 2018 WL 10215710 (D. N.M. Jan. 12, 2018).

[359] *Id.* (declaring "Defendants have taken Plaintiff's version of events as true" before undercutting nearly all of them).

[360] Petitioner's Reply Brief, at *2, fn. 2, Torres v. Madrid, 141 S. Ct. 989 (2021) (No. 19-292), 2020 WL 1478595.

[361] *Id.*

Finally, while officers are frequently pitted against lay witnesses in courtrooms across the country in criminal cases and often found credible, the stakes are different in a civil lawsuit where the officer is *personally* sued.[362] Consider the lengths the officers went to in *Petro v. Town of West Warwick*,[363] which is similar in some ways to both *Kisela* and *Torres*.

Officers responded to a 911 call suggesting a person had vandalized a liquor store sign late at night.[364] When they arrived, they saw no damage to the sign.[365] When they conducted a perimeter check, they found Mark Jackson, a man with psychiatric and neurological disorders, smoking a cigarette behind the store, a place he frequented.[366] They had no legal basis to detain or arrest him,[367] but the officer-defendants in the civil rights case gave many conflicting statements during the course of their trial about this fact.[368]

When officers asked Jackson to speak with them, he walked away.[369] Some officers characterized his walk as speedy, arousing their suspicion that he was fleeing from them, while others described him walking away at a normal pace.[370] The officers

[362] Some have remarked that police officers know how to appear credible when their deadly force results in criminal charges. Shaila Dewan, *Few Police Officers Who Cause Deaths Are Charged or Convicted*, N.Y. TIMES (Nov. 30, 2021) ("Police know what to say and what to tell a jury and what to tell a judge to make those folks believe that they were reasonably in fear. .... Even if there are other witnesses, those witnesses just don't get the same amount of credibility determination from prosecutors, judges, juries.").

[363] 889 F. Supp. 2d 292 (D. R.I. 2012).

[364] *Id*. at 302.

[365] *Id*. at 303.

[366] *Id*. at 301-03.

[367] *Id*. at 303.

[368] *Id*. at 302-04.

[369] *Id*. at 304.

[370] *Id*. at 304.

ordered him to stop and when he did not, they assaulted him, pepper sprayed him multiple times, and laid him down to restrain him, where he asphyxiated and died.[371]

The district court judge ruled in favor of Jackson's estate.[372] The judge wrote a lengthy fact section detailing every instance the officers were impeached by their prior inconsistent statements, every instance they collectively remembered details that benefitted them, and every instance they collectively forgot details that hurt them.[373] The judge was particularly upset about the fact that none of the sued officers could remember a long conversation they had about whether they should administer CPR to Jackson; this conversation was caught on camera without sound, as Jackson lay still, dying on the ground.[374] The judge said this:

> The Court finds this collective lack of recollection not credible and that it reflects a probable "code of silence" as to what the officers were discussing. These Defendants and their fellow officers had little difficulty recalling other events and statements that tended to support Defendants' position. Failing to recall even the general nature of any conversation or discussion (let alone the specifics) regarding CPR where the video clearly shows they were talking and exchanging a barrier mask, under circumstances that begged for a discussion of that topic, is simply not believable.[375]

This court acknowledged, in a rare rebuke of police officers, that they sometimes lie collectively and individually to protect themselves when faced with personal lawsuits.

The same thing happened in *Torres*, *Kisela*, and likely *Tolan* too. In *Torres*, Williamson and Smith tried to place Madrid in front of Torres's car during their depositions. They only changed their testimony when they were impeached multiple

[371] *Id.* at 304-08.
[372] *Id.* at 346.
[373] *Id.* at 301-16.
[374] *Id.* at 313.
[375] *Id.*

times with their diagrams and prior inconsistent statements given the day after the shooting. In *Kisela*, the shooting officer tried to say the plaintiff's knife was raised to stab her roommate though no one else at the scene, including his coworkers, supported his account.

Federal judges should expect that both civil rights plaintiffs *and officers* have something to gain or lose from the lawsuit. Addressing this issue, the *Tolan* Court said,

> The witnesses on both sides come to this case with their own perceptions, recollections, and even potential biases. It is in part for that reason that genuine disputes are generally resolved by juries in our adversarial system. By weighing the evidence and reaching factual inferences contrary to Tolan's competent evidence, the court below neglected to adhere to the fundamental principle that at the summary judgment stage, reasonable inferences should be drawn in favor of the nonmoving party.[376]

Some officers will go to great lengths to avoid civil rights lawsuits. Officers have arrested people to shift attention to the arrestee and away from their own unlawful conduct,[377] or to harass people who complain about civil rights violations.[378] There is even a name to describe the charges officers bring against people to camouflage their own use of excessive force or other civil rights violations: cover charges.[379] The practice has been documented for decades.[380] In Chicago, one study found that twenty percent of all cases that resulted in settlements from 2011 to 2016 involved malicious prosecution

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[376] Tolan, 572 U.S. at 660.

[377] Ryan P. Sullivan, *Revitalizing Fourth Amendment Protections: A True Totality of the Circumstances Test in § 1983 Probable Cause Determinations*, 105 IOWA L. REV. 687, 689-90 (2020).

[378] Jocks v. Tavernier, 316 F.3d 128, 132 (2d Cir. 2003).

[379] Jonah Newman, *Chicago Police Use "Cover Charges" to Justify Excessive Force*, THE CHICAGO REPORTER (Oct. 23, 2018) (officers use criminal charges that lack probable cause to cover up illegal actions or justify excessive force), https://www.chicagoreporter.com/chicago-police-use-cover-charges-to-justify-excessive-force/; Stephen M. Ryals, *Prosecution of Excessive Force Cases: Practical Considerations*, 18 TOURO L. REV. 713, 716 (2002) ("it is a classic pattern that the officers will use excessive force and then issue the charges to cover for their misconduct").

[380] *Id.*

claims stemming from cover charges.[381] Those settlements alone cost the city of Chicago $33,000,000.[382] Resisting arrest is a notorious cover charge; in Chicago, half of all resisting arrest charges are ultimately dismissed by prosecutors, which raises red flags.[383]

Other common cover charges are assault or aggravated assault of an officer.[384] Torres pled guilty to assaulting an officer, even though none of the officers testified they were injured on the day of the shooting. Photos taken by the NMSP that day do not depict a single injury on any of the officers.[385]

In the defendants' motion to dismiss Torres's complaint, one of the primary reasons officers gave for dismissal was Torres's guilty pleas.[386] They relied upon the *Heck* doctrine, which prevents some § 1983 plaintiffs from essentially attacking criminal convictions collaterally.[387] In this way, officers view cover charges as a pre-emptive defense to civil rights lawsuits. The Department of Justice has recognized this is a problem.[388] And the Supreme Court recently held that a man who was maliciously charged with crimes by officers following their civil rights violations could sue officers because his charges were dismissed, even though he could not prove the basis for their dismissal.[389] This opens the doors for civil rights plaintiffs to sue officers who

[381] Newman, *supra* note 380 (officers use criminal charges that lack probable cause to cover up illegal actions or justify excessive force.
[382] *Id*.
[383] *Id*.
[384] *Id*.
[385] Appellant's Appendix, *supra* note 19, at *132-*37.
[386] Defendants' Motion to Dismiss, Torres v. Madrid, 2017 WL 11483838 (D. N.M. May 4, 2017) (No. 1:16-cv-01163-LF-KK).
[387] Heck v. Humphrey, 512 U.S. 477, 486–87 (1994).
[388] Newman, *supra* note 380.
[389] *Thompson v. Clark*, No. 20-659, ___ S. Ct. ___ , 2022 WL 994329, at *2-*3, *7 (2022).

maliciously charge them with crimes unsupported by probable cause as a distraction from their own flagrant civil rights violations.

Federal courts must stop giving officers the benefit of the doubt in civil rights cases. This is true when their testimony contradicts the plaintiff's testimony, and they are moving to dismiss or moving for summary judgment. It is especially true when the officers' own testimonies contradict each other, or when the testimony is ever-changing, inconsistent with prior statements, incredible, and self-serving, as they were in several of the cases mentioned above.

VIII. Conclusion

Police departments often find no reason to discipline officers who use excessive force, much less deadly force.[390] Legislatures see no benefit to regulating police conduct.[391] This leaves the job to federal judges, who have made it difficult for plaintiffs to sue officers for violations of constitutional rights that arise in the criminal context.[392] The Supreme Court is often the only entity upholding the Constitution, limiting police power, and protecting constitutional rights.[393]

Judges, regardless of politics or personality, often struggle with impartiality. [394] With a desire for uniformity and fairness, objectivity is forced upon them.[395] Being

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[390] CHEMERINSKY, *supra* note 3, at 26.
[391] *Id.*
[392] *Id.*
[393] *Id.* at 28.
[394] D. Richards, *The Theory of Adjudication and the Task of the Great Judge*, 1 CARDOZO L. REV. 171, 209 (1979) ("It is a peculiar distortion of what we properly demand of judges … to confuse impartiality, the ability to weigh fairly various competing considerations and to render considered judgments accordingly, with the impersonal denial and alienation of the self.").
[395] Amanda Peters, *The Meaning, Measure, and Misuse of Standards of Review*, 13 LEWIS & CLARK L. REV. 233, 238-42 (2009).

objective requires a measure of self-control.[396] No one wants to be accused of bias, especially judges. Judges who are influenced by things outside the facts and the law are viewed poorly in the legal profession and by society.[397] Nevertheless, judges are humans and all humans have biases. However, we cannot settle for judges who favor civil rights plaintiffs to follow the legal standard while judges who favor law enforcement officers refuse to do so.

Perhaps between *Tolan* and another recent civil rights case remanded for more thorough factual review, *Lombardo v. City of St. Louis, Missouri*,[398] the Supreme Court is insisting that lower federal courts view facts not only in the proper light, but also with the proper level of detail, care, and attention. On the other hand, *Kisela* and *Torres*, cases with wildly different fact statements, remind us that judges tend to believe they are writing in the light most favorable to the nonmovant, even when a fact section claiming to be most favorable is objectively least favorable to the nonmovant.

Civil rights cases are highly fact dependent.[399] Therefore, they require federal judges to read the record carefully and thoughtfully. It is disheartening and shocking when Supreme Court Justices misread or do not read the record, or render biased factual accounts based solely on the defendant-officer's narrative. It demonstrates bias, a lack of care and attention, and a disregard for the legal lens they are required to use when viewing the facts. It is not too much to ask that civil rights cases and plaintiffs be

[396] Richards, *supra* note 395, at 209 ("It is a peculiar distortion of what we properly demand of judges … to confuse impartiality, the ability to weigh fairly various competing considerations and to render considered judgments accordingly, with the impersonal denial and alienation of the self.").

[397] Robert P. Smith, Jr., *Explaining Judicial Lawgivers*, 11 FL. ST. U. L. REV. 153, 156 (1983) (relying on Benjamin Cardozo's and Karl Llewellyn's writings).

[398] 141 S. Ct. 2239, 2240-42 (2021).

[399] Scott v. Harris, 550 U.S. 372, 387 (2007) (Breyer, J., concurring).

given the proper attention and respect they deserve, and that the standard of factual review be honored by the very appellate courts who created it.